IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

TUESDAY, THE 27TH FEBRUARY 2007 / 8TH PHALGUNA 1928

CRL.A.No. 2502 of 2006(B)

SC.15/2001 of ADDL. SESSIONS COURT (ADHOC), KALPETTA
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APPELLANT: (RESPONDENT):

JOSE @ BABU,
C.NO.3920, CENTRAL PRISON,
KANNUR.

BY ADV. K.K.RAJEEV(STATE BRIEF)

RESPONDENTS: (COMPLAINANT):

STATE OF KERALA, S.I. OF POLICE,
THIRUNELLY POLICE STATION, C.R.NO.52/99.

BY PUBLIC PROSECUTOR SRI.K.S. SIVAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 27-02-2007 THE COURT ON **27/02/2007** DELIVERED THE FOLLOWING:

V. RAMKUMAR, J.

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Crl. Appeal No. 2502 of 2006 A

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Dated: 27-02-2007

JUDGMENT

In this appeal preferred from the Central Prison, Kannur, the appellant who was the sole accused in S.C. 15/01 on the file of the Addl. Sessions Judge (Adhoc I), Kalpetta, challenges the conviction entered and the sentence passed against him for an offence punishable under Sec. 55 (a) of the Abkari Act.

2. The case of the prosecution is that on 3-5-1999 at 7.10 p.m. the accused was found in possession of 17 packets each containing 100 ml. of Karnataka made arrack at Thazhekattikulam in Thrissileri amsom inside a stage carriage bus bearing registration No. KLZ -8285 by name N.B.S. plying between Bavali and Mananthavady and the accused has thereby committed an offence punishable under Sec. 55(a) of the Abkari Act.

3. On the accused pleading not guilty to the charge framed against him by the court below for an offence punishable under Sec. 55(a) of the Abkari Act, the prosecution was permitted to adduce evidence in support of its case. The prosecution

altogether examined 9 witnesses as P.Ws 1 to 9 and got marked 8 documents as Exts. P1 to P8 2 material objects marked as MO1 and MO2 series.

4. After the close of the prosecution evidence, the accused was questioned under Sec. 313 (1) (b) Cr.P.C. with regard to the incriminating circumstances appearing against him in the evidence for the prosecution. He denied those circumstances and maintained his innocence. He had the following to submit before Court:-

He was slightly drunk when he got down from the bus at Kattikkulam and was proceeding to his daughter's house. While so, the police men came and forcibly took him in their Jeep. His family was informed about his arrest only after 16 hours. He is a patient of psoriasis for the last 12 years. He is innocent.

5. Since the Court below did not consider this a fit case for recording an order of acquittal under Sec. 232 Cr.P.C. the accused was called upon to enter on his defence and to adduce any evidence which he might have in support thereof. He did not adduce any defence evidence.

6. The learned Addl. Sessions Judge, after trial, as per judgment dated 20-9-2006 found the appellant guilty of the

offence punishable under Sec. 55(a) of the Abkari Act and sentenced him to undergo rigorous imprisonment for one year and to pay a fine of Rs. 1,00,000/- and on default to pay the fine to suffer rigorous imprisonment for three months more. He was also allowed set off under Sec. 428 Cr.P.C. It is the said judgment which is assailed in this appeal.

7. I heard Advocate Sri. K.K. Rajeev, the learned counsel who defended the appellant on State Brief and Advocate Sri. K. S. Sivakumar, the learned Public Prosecutor who defended the State.

8. The only point which arises for consideration in this appeal is as to whether the conviction entered and the sentence passed against the appellant are sustainable or not ?

THE POINT:-

9. P.Ws.1 and 2 are the independent witnesses to Ext.P1 scene mahazar. Eventhough both of them admitted their signatures in Ext.P1, they turned hostile to the prosecution. P.W.3 is the Sub Inspector of Police, Tirunelli who laid the charge. Ext.P2 certificate of Chemical Analysis was marked through him. P.W.4 is the cleaner of the bus from which the accused was arrested and the packets of contraband liquor were seized. He

also did not support the prosecution. P.W.5 is the Addl. Sub Inspector of Tirunelli who detected the offence. P.W.6 is the headconstable who had accompanied P.W.5. P.W.7 is another headconstable who in his capacity as the Station House Officer registered Ext.P6 F.I.R. P.W.8 is the subsequent S.H.O. Tirunelli who produced the MOs as per Ext.P7 property list. P.W.9 is the Sub Inspector, Tirunelli, who conducted the investigation. Ext.P8 forwarding note was filed by him during the course of the investigation.

10. Advocate Sri. K.K. Rajeev made the following submissions before me in support of his fervent plea for acquittal of the accused:-

Eventhough the packets of contraband liquor were allegedly seized on 3-5-1999, they were produced before the Magistrate only on 6-5-1999. There is thus non-compliance with the mandatory provisions of Sec. 102 (3) Cr.P.C. The specific penal provision pertaining to arrack is Sec. 58 and not Section 55(a) of the Abkari Act as has been held in ***Surendran v. Excise Inspector - 2004 (1) KLT 404*** and ***Sudhepan @Aniyan v. STate of Kerala 2005 (2) KLD (Crl) 631*** *and* ***Mohanan v. State of Kerala - 2007 (1) KHC 752.*** There has been non-

compliance of S.R.O. 321/1996 since P.W.5 who detected the offence cannot be said to be an officer of and above the rank of Sub Inspector and an officer of such a rank alone can be termed as an Abkari Officer competent to detect the offence of this nature. This illegality will vitiate the trial.

11. I am afraid that I cannot agree with the above submissions. The arrest, search and seizure was at 7.20 p.m. on 3-5-1999 from a bus. The detection took place at a place called Kattikkulam. P.W.5 who was the Addl. Sub Inspector, Mananthavady along with his police party were proceeding in their Jeep in Thrissilery amsom and conducting an abkari raid. At the relevant time the police party was checking the stage carriage buses at Kattikulam town. When the particular bus bound to Mananthavady from Bavali came , he signalled the bus to stop and started checking inside the bus. While so, the accused holding a green coloured plastic carry bag hurriedly got down from the bus. Getting suspicious he was restrained and the contents of the said bag was examined to find 17 packets of Karnataka made arrack. The accused was unable to give any satisfactory answers to the questions asked by the police party with regard to the above packets. He was arrested and the

packets were seized under Ext.P4 seizure mahazar. The contents of four of the packets were poured into two bottles each of 375 ml. by way of samples the sample bottles were packed and sealed. The remaining 13 packets of arrack, the two sealed sample bottles, the 4 empty packets as empty packets and the green plastic carry bag in which the 17 packets were found, were all produced before the J.F.C.M., Mananthavady, who received the same on 6-5-1999 as 137/99. Ext.P7 is the property list evidencing the production and receipt of the above properties before court. During the course of investigation, P.W.9 the Sub Inspector of Tirunelli Police Station submitted Ext.P8 forwarding note for despatching the sample bottles to the chemical examiner for analysis. The bottles were forwarded as per a covering letter dated 22-9-1999 of the Magistrate. Ext.P2 is the certificate of analysis dated 22-12-1999 wherein it is stated that two sealed sample bottles were received with their seals intact along with the letter dated 22-9-1999 to J.F.C.M., Mananthavady and involved in Crime No. 52/99 and that the samples on analysis were found to contain 36.04 percent and 36.28 percent by volume of Ethyl Alcohol.

12. The evidence of P.W.5 and P.W.8 would go to show

that the properties were in their respective custody until production before the court on 6-5-1999. The sample bottles were produced with their seals intact. The delay of three days in such circumstances cannot be fatal particularly when Sec. 102 (3) Cr.P.C. does not provide for the consequence of non-compliance of the said provision. Hence the non-compliance of Sec. 102 (3) Cr.P.C. cannot be fatal to the prosecution in this case. This aspect of the matter has been considered by this court in **Vikraman @ Dibsoo v. State of Kerala - 2006 KHC 1629.**

13. The argument based on the alleged non-compliance of S.R.O. No. 329/1996 for the alleged reason that P.W.5 was not an officer of and above the rank of a Sub Inspector is also misconceived. P.W.5 was an additional Sub Inspector and not an Assistant Sub Inspector. Hence it cannot be said that Addl. Sub Inspector is not an officer of and above the rank of a Sub Inspector. Even if he was not an officer of and above the rank of a Sub Inspector, the non-compliance of S.R.O. 329/96 also cannot be fatal to the prosecution since the said illegality in investigation cannot in any way affect the jurisdiction of the Magistrate to take cognizance of the offence. This aspect of the matter has also been considered by this Court in the decision

reported in ***2006 KHC 1629 (supra)*.**

14. The distinction said to be made between Section 55 (a) and Section 58 of the Abkari Act to contend for the position that with regard to arrack, Section 58 is the proper penal provision, is also a distinction without any difference. The contraband liquor seized in this case is arrack. Section 8 of the Abkari Act provides as follows:

> *"8. (1)* ***Prohibition of manufacture, import, export, transport, transit, possession, storage, sales, etc. of arrack:-*** *No person shall manufacture, import, export, transport (without permit transit), possess, store, distribute, bottle or sell arrack in any form.*
>
> *(2) If any person contravenes any provision of sub-section (1), he shall be punishable with imprisonment for a term which may extend to ten years and with fine which shall not be less than rupees one lakh".*

15. The prohibition under Sec. 8(1) of the said Act came into force with effect from 3-6-1997 after which date no person is entitled manufacture, import, export, transport, without permit transit , possess, store, distribute bottle or sell arrack in any form. In the present case arrack presumably manufactured in the State of Karnataka was being transported in a stage carriage bus. Any person who does so is liable to punishment under Sec.

8(2) of the Abkari Act wherein the punishment is imprisonment for a term which may extent to 10 years and with fine which shall not be less than Rs. 1,00,000/-. Thus, at any rate with effect from 3-6-1997 the specific penal provision pertaining to arrack is Section 8 of the Abkari Act.

16. Now coming to Section 55 (a) of the Abkari Act for which the appellant stands convicted, Section 55 of the Abkari Act reads as follows:

> *"55. For illegal import, etc:- Whoever in contravention of this Act or of any rule or order made under this Act*
>
> *(a) imports, exports (transports, transits or possesses) liquor or any intoxic*ating drug;" r
>
> (b) manufactures liquor or any intoxicating drug;
>
> (c) (x x x)
>
> (d) (taps or causes to be tapped) any toddy-producing tree, or
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> (e) (draws or causes to be drawn) toddy from any tree or
>
> (f) constructs or works any (distillery, brewery, winery or other manufactory in which liquor is manufactured) or
>
> (g) uses, keeps or has in his possession any materials, still utensil, implement or appratus whatsoever for the purpose of maufacturing liquor other than toddy or any intoxicating drug; or

(h) bottles any liquor for purposes of sale; or)

(i) (sells or stores for sale liquor) or any intoxicating drug)
shall be punishable

(1) for any offence, other than an offence falling under clause (d) or clause (e), with imprisonment for a term which may extend to (ten years and with fine which shall not be less than rupees one lakh and)

(2) for an offence falling under clause (d) or clause (e), with imprisonment for a term which may extend to one year, or with fine which may extend to ten thousand rupees or with both".

Thus, under Section 55 (a) of the Act, if any person in contravention of the Act or Rule or Order made under the Act imports, exports, transports, transits or possesses liquor or any intoxicating drug he is punishable with imprisonment for a term which may extent to 10 years and with fine which shall not be less than Rs. 1,00,000/-. Going by the title of the Section, it may not be far-fetched to say that the possession envisaged by the section in is possession incidental to or in the course of import, export, transport, transit etc. The expression "liquor" has been defined under Section 3 (10) of the Act as follows:-

"Liquor:- "Liquor" includes spirits of wine, (arrack), spirits, wine, toddy, beer and all liquid

consisting of or containing alcohol;"

17. There cannot be any dispute that arrack consists of alcohol namely, Ethyl Alcohol. So arrack is liquor the transportation, possession, etc. of which squarely attracts Sec. 55 (a) of the Abkari Act. The definition of "arrack" under Section 3 (6A) is also relevant in this connection. The said definition reads as follows:-

> *"(3 (6A) "Arrack" means any potable liquor other than Toddy, Beer, Spirits of Wine, Wine, Indian made spirit, foreign liquor and any medicinal preparation containing alcohol manufactured according to a formula prescribed in a pharmacopoeia approved by the Government of India or the government of Kerala, or manufactured according to a formula approved by the Government of Kerala in respect of patent and proprietary preparations or approved as a bona fide medicinal preparation by the Expert Committee appointed under Section 68 A of the Act).*

Section 58 of the Act seeks to punish a person for possession of illicit liquor. The said Section reads as follows:-

> ***58. For possession of illicit liquor:-*** *Whoever, without lawful authority, has in his possession any quality of liquor or of any intoxicating drug, knowing the same to have been unlawfully imported, transported or manufactured, or knowing (the duty, tax or rental payable under this Act) not to have been paid therefor, (shall be punishable with imprisonment for a term whichmay extend to ten years and with fine which shall not be less than rupees one lakh".*

The expression “illicit liquor” is found only in the title of the section and not its body. Thus, a person having without lawful authority any quantity of liquor in his possession knowing the same to be unlawfully imported, transported or manufactured etc. is punishable under Section 58 of the Act with imprisonment for a term which may extent to 10 years and with fine which shall not be less than Rs. 1,00,000/-. Probably, except for the ingredient of “knowledge” mentioned in Section 58 which is a conscious mental state, there does not appear to be much difference or distinction between Sec. 8, Sec, 55 (a) and Sec. 58 of the Abkari Act, so far as the transport of arrack is concerned. Since Ext.P2 certificate of chemical analysis does not mention that the sample which contained more than 36% by volume of ethyl alcohol belonged to the excluded categories of potable liquor as mentioned in Sec. 3 (6A) of the Act which has defined “arrack”, it can safely be concluded that the sample was arrack Indeed, there is no contention otherwise before me.

18. As mentioned earlier, the conviction of the appellant in this case could have been recorded under any of the said penal provisions, namely Sec. 8(2), 55(a) or 58 of the Abkari Act. In any view of the matter, the conviction of the appellant under Sec. 55

(a) of the Abkari Act by the Court below cannot be faulted. Even where it is doubtful as to what offence has been committed by the accused due to the smilarity of the act constituting the offences, Sec. 221 (2) Cr.P.C. is a pointer which entitles the Court to convict the accused for the offence which he is shown to have committed although he was not charged with it. The said provision reads as follows:

> *:221: Where it is doubtful what offence has been committed - (1) If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.*
>
> *(2) If in such a case the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of sub-section (1), he may be convicted of the offence which he is shown to have committed although he was not charged with it".*

19. Hence even assuming that there was any error in the charge the same would not go to the rescue of the accused. This is particularly so in view of the fact that it is a curable irregularity in the light of Section 454 Cr.P.C. which reads as

follows:

> ***454. Appeal against orders under Section 452 or Section 453 -*** *(1) Any person aggrieved by an order made by a Court under Section 452 or section 453, may appeal against it to the Court to which appeals ordinarily lie from convictions by the former Court.*
>
> *(2) On such appeal, the Appellate Court may direct the order to be stayed pending disposal of the appeal, or may modify, alter or annul the order and make any further orders that may be just.*
>
> *(3) The powers referred to in sub-section (2) may also be exercised by a Court of appeal, confirmation or revision while dealing with the case in which the order referred to in sub-section (1) was made".*

20. The result of the foregoing discussion is that the conviction of the appellant under Section 55 (a) of the Abkari Act does not appear to be illegal or unsustainable and I confirm the same.

21. What now survives for consideration is the question of the legality and extent of the sentence imposed on the appellant. The learned counsel for the appellant submitted that the appellant is a 64 year old person who is afflicted with the incurable disease called psoriasis and the sentence of imprisonment of one year imposed on him is on the higher side.

23. I cannot agree that the sentence of imprisonment

awarded to the appellant is excessive or disproportionately high having regard to the gravity of the offence. The apapellant was found carrying 17 packets of illicit arrack evidently for sale. It was noticing the deleterious effect of this liquor on the human system that the legislature stepped in by imposing a total ban on the manufacture, sale, transport etc. of arrack This drug has ruined several families. Considering its impact on the society, penal servitude by way of incarceration for one year cannot be said to be harsh or excessive. I see no reason to interfere with the sentence imposed as well.

In the result, this appeal fails and is accordingly dismissed confirming the conviction entered and the sentence passed against the appellant.

V. RAMKUMAR
(JUDGE)

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V. RAMKUMAR, J.

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Crl. Appeal No. 2501 of 2006 A

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Dated: 26-02-2007

JUDGMENT

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